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In the

Supreme Court of the United States

OCTOBER TERM, 1934

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DAN E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, E. A. BELLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

VS

HOMER H. JOHNSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF OF RESPONDENT IN OPPOSITION

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SUBJECT INDEX

Statement 2

Supplemental Statement of the Case 2

Questions Presented Restated 5

Summary of Respondent's Argument 6

I. Federal Question Was Never Properly Raised 8

II. No Substantial Federal Question is Involved 11

Jurisdiction of Commission is Limited to Questions That Involve the Public Interest in the Proper Operation of a Station and Does Not Extend to a Private Controversy Relating to a Station 12

It Should be Assumed the Commission Will Approve Transfer of License to Lessor in Order to Assure Continuance of Station's Operation in the Public Interest 14

III. Decision is Sustained on Non-Federal Ground 15

IV. So Special or Important Reasons Exist for Granting Certiorari 18

V. The Petition and Brief of Petitioners do not Disclose Adequate Reasons for Granting Certiorari 20

Petitioners' Statement of "Questions Presented" is Inaccurate 20

Petitioners Have Not Shown Any Reason or Basis for Respondent to Intervene in Proceedings Before the Commission 21

Petitioners' Claim That Federal Question Was Properly Raised is Not Supported by Record 22

Petitioners' Claim That the Public Interest was Involved is Not Supported by the Record 23

Petitioners' Claim That Commission Has Primary Jurisdiction of All Questions Relating to Radio Cannot be Sustained 25

Petitioners' Claim That Commission Has Exclusive Jurisdiction Cannot be Sustained 27

Petitioners' Claim that Non-Federal Grounds Do Not Exist is Contrary to the Record 30

Petitioners' Claim That the Commission Has Jurisdiction of Proceedings to Cancel a License Has No Application to the Present Case 31

Petitioners' Claim That Court Attributed Property Interest in Station License is Contrary to the Record 31

Petitioners' Claim That the Case is of Vital Public Importance is Not Supported by the Record 32

Conclusion 33

CITATIONS

Cases:

Becher v. Contoure Laboratories, 279 U. S. 388 28

Deming v. Carlisle Packing Co., 226 U. S. 102 14

Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470, 475 13
Flournoy v. Wiener, ... U. S. ..., 88 L. Ed. Advance Opinions, 473, 482 17
General American Tank Car Corporation v. El Dorado Terminal Co., 308 U. S. 422 26
General Trading Company v. State Tax Commission of the State of Iowa, ... U. S. ..., 88 L. Ed. Advance Opinions, 914, 915 17
Heitmeyer v. FCC, 95 Fed. 2d, 91 24
Herndon v. Georgia, 295 U. S. 441 11
Klinger v. Missouri, 80 U. S. 257 17
Louisville & Nashville Railroad Co. v. Woodford, 234 U. S. 46 11
Marony v. Applegate, 266 App. Div. 412, 42 N. Y. S. (2d) 768 25
Mays v. Fritton, 87 U. S. 414 19
Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 651 11
Missouri, Kansas & Texas Railway v. Sealey, 248 U. S. 363 11
National Broadcasting Company v. United States, 319 U. S. 190, 216, 219 13
Pratt v. Paris Co., 168 U. S. 255, 259 27
Southern Broadcasting Company v. Carlson, 187 La. 823, 827; 175 So. 587, 589 13
Venner v. Michigan Central R. R. Co., 271 U. S. 127 28
Yakus v. United States, ... U. S. ..., 88 L. Ed. Advance Opinions, 653, 671 17
Zuch v. King, 260 U. S. 176, 177 14

Statutes:

Communications Act of 1934, as amended, Sec. 310 (b) 5, 12, 13, 14, 18, 19, 21, 23, 24, 25, 29

Miscellaneous:

In the Matter of Buffalo Broadcasting Corp. (WKBW), 9 F. C. C. 31, 32 29
In the Matter of the Revocation of License of the Panama City Broadcasting Company (WDLP), 9 F. C. C. 208 31

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

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STATEMENT

The primary purpose of this action was to cancel a radio station lease procured by fraud. The petitioners, from the time the action was commenced, acknowledged that the court had jurisdiction to determine that question, and in fact asked it to do so. Not until after the court below ordered that the lease be canceled for such fraud did the petitioners question the jurisdiction of the court to decide that issue. It was first asserted in petitioners' motion for rehearing that the Federal Communications Commission, hereinafter referred to as the Commission, had exclusive jurisdiction to determine whether the lease was procured by fraud.

Respondent believes *certiorari* should be denied because (1) A federal question was not properly or timely raised; (2) The claim that the Commission has exclusive jurisdiction of a question of local law involving a radio station is so frivolous as to present no substantial federal question; (3) The decision is sustained on non-federal grounds that under local law the lease is void; and (4) No question of public interest or of substance is involved.

These reasons will be discussed after making a supplemental statement of the case and restating questions presented. The discussion of these reasons will be followed by a consideration of the sufficiency of the grounds asserted by petitioners.

SUPPLEMENTAL STATEMENT OF THE CASE

We deem it necessary to correct certain inaccuracies and omissions in petitioners' statement of the case in order that it contain all that is material to the consideration of the question presented. We believe it will be

less confusing to state all the material facts rather than to call attention to inaccuracies and omissions in petitioners' statement.

1. On October 3, 1942, the petitioner, Woodmen of the World Life Insurance Society, hereinafter referred to as the Society, or lessor, leased its radio station for 15 years to petitioner, Radio Station WOW, Inc., hereinafter referred to as lessee, and subject to the approval of the Commission, assigned to the lessee the license to operate the station (R. 21-27).

2. On October 7, 1942, lessor and lessee filed a joint application with the Commission for consent to transfer the license to operate the station (Ex. 29, R. 376, 375).

3. On November 23, 1942, respondent, as a member of the lessor, commenced this action to cancel the lease and assignment of the license because they were procured by fraud from the lessor (R. 1-10).

4. On December 15, 1942, the Commission consented to the assignment of the license providing the assignment was made within 30 days (Ex. 32, R. 662, 661).

5. On January 5, 1943, the lessor and lessee filed a joint petition with the Commission, setting forth the pendency of respondent's action, and requested an extension of time for the assignment of the license "until final adjudication of the action" (Ex. 33, R. 667-669, 663).

6. On January 12, 1943, the Commission denied the aforesaid petition (Ex. 34, R. 664). No appeal was taken from that order.

7. On January 14, 1943, the station and license were transferred by lessor to lessee (R. 177).

8. On March 15, 1943, the trial court held that respondent had not established fraud and dismissed the case (R. 735-737).

9. On March 10, 1944, the Supreme Court of Nebraska entered a judgment reversing the trial court, finding that the lease to the station, the lease to the space occupied by the station, and the transfer of the license should be canceled (R. 744-745). On the same day an opinion was filed holding that the lease and assignment were fraudulently procured from the lessor (R. 745-761).

10. On March 30, 1944, petitioners filed a motion for rehearing and for an affirmance of the judgment of the district court dismissing the action. It was asserted therein, *and for the first time,* that the Nebraska courts had no jurisdiction of the action because exclusive jurisdiction was vested in the Commission and the decision deprived them of their property in violation of the Constitutions of the United States and of Nebraska (R. 769-775).

11. Thereafter, on March 30, 1944, petitioners filed a motion to dismiss the action because the court had no jurisdiction over the subject matter, and exclusive jurisdiction was in the Commission (R. 775-6, 782).

12. On May 26, 1944, the court denied the motions for rehearing and to dismiss (R. 793-794). On the same day it filed a supplemental opinion in which it stated the jurisdiction of the Commission was only over the transfer of the license; that there never had been any contention to the contrary; that the jurisdiction of the state court to determine whether the lease and assignment were procured by fraud could not be properly questioned for the first time after the decision of the court was rendered; that under the Nebraska practice the constitutional questions

could not be considered because not raised in the trial court (R. 794-799).

QUESTIONS PRESENTED RESTATED

We believe the jurisdictional questions presented, as set forth by petitioners (Pp. 3-4) may be more accurately stated as follows:

1. Whether the provisions of the Communications Act conferring on the Commission authority to decide whether the tranfer of a *license* to operate a radio station "is in the public interest," gives the Commission exclusive jurisdiction of all actions relating to radio stations and deprives a state court of jurisdiction to determine a question of local law relating to the station, such as the cancellation of a *lease* of a station because of fraud in its procurement.

2. Whether a decision of a state court holding that a lease of a radio station should be canceled because of fraud in its procurement and directing that the station be returned to the owner but holding "the question of the federal license being a question solely for the Federal Communications Commission," deprives the lessor or lessee of any rights claimed under the Communications Act, or deprives them of their property without due process of law in violation of the Constitution of the United States.

The only statute involved is Sec. 310 (b) of the Communications Act of 1934, as amended, 47 U. S. C., Sec. 310 (b). Subsequent references to the Communications Act are to Sec. 310 (b) unless otherwise stated.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent's argument will first discuss four reasons why *certiorari* should not be granted, and will then consider the sufficiency of the grounds asserted by petitioners. The reasons why *certiorari* should not be granted are:

I. A federal question was never properly raised

(a) The petitioners did not question the jurisdiction of the court until the filing of their motion for rehearing.

(b) Petitioners specifically recognized the jurisdiction of the court and asked the Commission to extend the time for transferring the station until "the rights of the parties should be fully adjudged in said action," referring to *this* action.

(c) The court, in denying the motion for rehearing, did not base its decision solely on a federal question.

II. No substantial federal question is involved

(a) No sound basis exists for the claim that the Commission has exclusive jurisdiction of actions of every character involving a radio station, including one to cancel a lease procured by fraud.

(b) The jurisdiction of the Commission is limited to protection of the public interest in the proper operation of radio stations and does not extend to controversies of a private nature.

(c) The assertion that the local question of fraud in procuring the lease must be determined by the Commis-

sion is so frivolous as to present no substantial federal question.

III. The decision is sustained on non-federal grounds

(a) The determination of the question as to whether the lease of the station was procured by fraud is one of local law and the decision of the court below that the lease is void because of such fraud is a non-federal ground.

(b) The holding of the court below that the so-called federal grounds had not been properly raised under the Nebraska practice is a non-federal ground.

IV. No special or important reasons exist for granting certiorari

(a) The petitioners have not been improperly deprived of any rights.

(b) Petitioners have had a fair hearing in a court which they especially asked to decide the case on its merits.

(c) Petitioners claimed for the first time that the court had no jurisdiction whatever after the decision against them.

(d) The record shows that the court was fully justified in refusing to consider such a belated claim, and no question of importance to the public is involved in that decision.

I.

FEDERAL QUESTION WAS NEVER PROPERLY RAISED

The record does not show that a federal question was properly raised and preserved. It was not raised until in petitioners' motion for rehearing, and then the decision of the court below was not based solely on that ground.

The purpose of the action was to cancel the *lease* of the radio station because it was procured by fraud, and also to cancel an assignment of the *license* to operate the station for the same reason (R. 1-10).

Petitioner's brief does not clearly disclose that two jurisdictional questions are involved, *first*, jurisdiction to determine whether the *lease* was procured by fraud, and *second*, jurisdiction to determine whether the *license* to operate the station should be transferred back to the lessor. The court below, when the question was first raised in the motion for rehearing, decided that it had jurisdiction of the first and that the Commission had exclusive jurisdiction of the second, and such had always been the position of all parties (R. 794-799).

No question was ever raised by any of the petitioners as to the jurisdiction of the court to determine whether the *lease* was procured by fraud until in the motion for a rehearing. The court, in denying a rehearing, filed a supplemental opinion which held,

> "The claim of defendants that the court has no jurisdiction of the subject matter of the action is contrary to the pleadings filed by the defendants in the trial court" (R. 797).

No claim was ever made by any of the parties that the Commission did not have jurisdiction over the transfer of the *license* to operate the station. The answer filed by lessor and its officers alleged in paragraph 18 that the Commission

> "has and concedes that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of the license to operate said station" (R. 21).

Respondent admitted the foregoing allegation in paragraph 4 of his reply (R. 36).

The answer filed by the lessee and its manager did not question the jurisdiction of the court. It merely stated the lessee was operating the station under the lease and "orders" of the Commission (R. 31).

Furthermore, both the lessor and lessee filed a joint petition with the Commission to extend the time for transferring to the lessee the station and license, stating

> "that before said transfer and assignment be made the rights of the parties should be fully adjudged in said action."

The prayer of the joint petition is that the time be extended

> "until final adjudication of the action pending in the District Court of Douglas County, Nebraska" (Ex. 33, R. 667, 669, 665).

A more complete acknowledgment of the jurisdiction of the court over this action can hardly be imagined. Petitioners who now assert the Commission has exclusive jurisdiction of this action are the very same ones who asked the Commission to extend the time for transfer of

the station and license until their rights could be "fully adjudged in said (this) action."

The petitioners filed briefs in the court below asking the court to affirm the judgment of the trial court, and there is no mention whatever of the court not having jurisdiction. In fact, in the brief filed by the lessor and its officers (Brief No. 2), it is stated on page 172,

> "It is conceded by all that the Federal Communications Commission had no jurisdiction over this litigation."

On page 16 of the same brief this statement appears, in describing the issues:

> "These appellees tried this case below strictly on the merits. We propose to submit our case upon appeal in the same manner."

The foregoing references to the record fully sustain our statement that petitioners never, at any time, questioned the jurisdiction of the court to determine the validity of the lease. Although at times the petitioners asserted the Commission had jurisdiction over the transfer of the license, which was admitted by respondent, yet they asked the Commission to extend the time for the transfer of the station and license until the rights of the parties could be fully adjudicated in this action.

The petitioners, in their motions for rehearing, first asserted that the court had no jurisdiction over any of the issues involved in the action. This was not only a new position assumed by them, but was directly contrary to their previous position throughout the litigation. *Strangely*, in those same motions, they again recognized the jurisdiction of the court by asking it to affirm the judgment of

the trial court which was a decision on the merits (R. 769, 778). The court below denied the motion for rehearing and filed a supplemental opinion in which it stated the Commission had jurisdiction over the transfer of the license only, and that such had always been the claim of the petitioners. The court below also declined to pass on constitutional questions asserted in the motion for rehearing, because not raised in the trial court as required by the Nebraska practice (R. 798).

From the foregoing it appears that a federal question was never properly raised by petitioners. In any event, it was not raised until in the motion for rehearing, which was too late, inasmuch as the court did not base its ruling solely on that ground. *Louisville & Nashville Railroad Co.* v. *Woodford*, 234 U. S. 46; *Missouri, Kansas & Texas Railway* v. *Sealy*, 248 U. S. 363; *Herndon* v. *Georgia*, 295 U. S. 441.

Petitioners have failed to sustain the burden of showing that this court has jurisdiction. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

Even if it be assumed for the purposes of an argument that a federal question was properly raised by petitioners, yet it was not substantial in character. The assertion of petitioners that the Commission has exclusive jurisdiction of this entire action and that the state court was wholly without jurisdiction is lacking in merit. As shown before (Pp. 8-10), the parties, as well as the court below, recognized that the Commission has jurisdiction of a

transfer of the license to operate the station. The question thus remaining is whether the courts of Nebraska have jurisdiction of an action to cancel a radio station lease fraudulently procured, or whether jurisdiction of such a controversy is vested exclusively in the Commission. The mere statement of the question seems to provide the answer.

Jurisdiction of Commission is Limited to Questions That Involve the Public Interest in the Proper Operation of a Station and Does Not Extend to a Private Controversy Relating to a Station

It is apparent from the provisions of the Communications Act quoted in petitioners' brief (Pp. 22, 45-47), and the cases construing the Act, that the jurisdiction of the Commission is limited to questions that involve the public interest, convenience, or necessity in the proper operation of a station. No such question is now or ever has been involved in this action. As a matter of fact, the station is being operated for the lessee by the same personnel as it was before the transfer. It is reasonable to assume that they will continue to operate the station when it is restored to the lessor. In any event, it is admitted by all parties that the lessor's operation of the station has been excellent, and that it is one of the outstanding stations of its kind in this country. It is likewise reasonable to assume that it can continue to operate the station in that manner when the station is returned to it.

Section 310 (b) of the Communications Act, on which petitioners rely, provides in substance that a station license shall not be transferred unless the Commission "decide that said transfer is in the public interest." The

phrase, "public interest," has been described by this court in *National Broadcasting Company* v. *United States*, 319 U. S. 190, 216, as "the interest of the listening public in 'the larger and more effective use of radio.'"

In considering the "public interest," this court has said, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475:

> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the communities reached by his broadcasts."

It clearly appears from the Communications Act and cases construing its provisions that the Commission is an administrative agency and charged only with supervision of radio facilities to the end that the interest of the radio public is properly protected by securing the best possible broadcasting service. Since no such question is involved in the present case, the Commission has no jurisdiction to determine whether the lease of this station was procured by fraud. No provisions have been cited giving it such jurisdiction, and in *National Broadcasting Company* v. *United States*, 319 U. S. 190, 219, it is said: "* * * Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry."

In *Southern Broadcasting Company* v. *Carlson*, 187 La. 823, 827, 175 So. 587, 589, the following construction placed on the Commission's jurisdiction seems a reasonable one:

> "But, from the general nature of these powers and duties, and their public character, we are constrained to believe that it was not intended by the act of Congress that the Communications Commission should

be called upon to decide disputes of a personal or private nature between individuals * * *."

Obviously, the question of fraud in the procuring of the lease is a question for the determination of the Nebraska courts, and the assertion that the Commission has exclusive jurisdiction of such a question is so frivolous as to present no substantial federal question, and the petition should therefore be denied. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Zuch* v. *King*, 260 U. S. 176, 177.

It Should be Assumed the Commission Will Approve Transfer of License to Lessor in Order to Assure Continuance of Station's Operation in the Public Interest

Furthermore, it appears that the petitioners are proceeding on the assumption that the Commission will not approve a transfer of the license from the lessee to the lessor. We see no justification for such an assumption. It is more reasonable to assume that the Commission will do anything that may be necessary to continue the operation of the station. Inasmuch as the court below directs the return of the station to the lessor it would seem logical to assume that the Commission will consent to the transfer of the license so that the station may be operated by the lessor just as it was prior to the making of the fraudulent lease. For the Commission to refuse such consent would be to deprive the listening public of the broadcasting facilities of the station, which would obviously be detrimental to the public interest and thus a violation of the responsibilities imposed on the Commission by the Communications Act.

A refusal by the Commission to consent to the transfer of the license would countenance and further the fraud

of the petitioners in their effort to deprive the lessor of the use of its station. It can safely be assumed that the Commission will fulfill its duty of seeing that radio broadcasting is continued by this station after it is returned to the lessor as ordered by the court below. The attempt of the petitioners to have this Court review the case on the theory that the Commission has exclusive jurisdiction and would sustain the validity of the lease, notwithstanding the fraud disclosed by the record, is so frivolous as to present no substantial federal question.

III.

DECISION IS SUSTAINED ON NON-FEDERAL GROUND

The decision of the court below is amply sustained on the non-federal ground that the lease of the station was procured by fraud upon the lessor. Furthermore, the holding of the court below that the so-called federal grounds were not properly raised under the Nebraska practice is a non-federal ground.

The question which the court below determined was the validity of the transfer of the station, while the question which the Commission determined was the ability of the lessee to operate the station after the transfer. Those questions were clearly separate ones, and the former was obviously non-federal.

The court below canceled the lease of the station and lease of space occupied by the station because of fraud, which included the following:

1. The station lease rental was so grossly inadequate as to establish fraud. It reduces the lessor's net income from the station from nearly $300,000 a

year to an average of about $74,000 a year for the term of the 15-year lease (R. 751, 760).

2. The officers of the lessor violated their fiduciary duties in making the station lease, not only as to the manner in which it was made but also because the consideration was grossly inadequate and its provisions failed to properly protect the lessor (R. 759, 760).

The Commission did not have jurisdiction of those issues nor did it consider or act upon them. As shown on page 12 its consideration of the proposed assignment of the license was, under the Communications Act, limited to determining whether the operation of the station in the public interest would be adversely affected by the transfer. The fact that the Commission approved the transfer cannot in any way be construed to be an approval of the fraudulent manner in which the lease was procured. The question of fraud practiced on the owner in procuring the lease is obviously a non-federal ground.

The effort of the petitioners to inject a federal question by asserting in their motion for rehearing that the Commission had exclusive jurisdiction was rightly rejected by the court below in holding that the petitioners, by their pleadings and conduct, had eliminated the question of its jurisdiction to determine whether the lease was fraudulently procured (R. 797).

Referring to a judgment of a state court it was recently said by this court:

> "The application by that Court of its local laws and the facts on which it founded its judgment are, of course, controlling here."

In *General Trading Company* v. *State Tax Commission of the State of Iowa*, .. U. S. .., 88 L. Ed. Advance Opinions, 914, 915.

Likewise, the constitutional questions were not considered by the court below because they were not raised in the lower court as required by the practice in Nebraska. This is not only a non-federal ground but it is also the rule in the federal courts. Recently the court said in *Yakus* v. *United States*, .. U. S. .., 88 L. Ed. Advance Opinions, 653, 671:

> "No procedure or principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

Furthermore, if any question exists as to whether the decision was based on a federal or non-federal ground, the question will be resolved in favor of the non-federal ground. *Klinger* v. *Missouri*, 80 U. S. 257. The following recent statement of Mr. Chief Justice Stone appears quite applicable to this case:

> "Hence, the case stands in the same posture as those in which we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here."

See also *Flournoy* v. *Wiener*, .. U. S. .., 88 L. Ed. Advance Opinions, 478, 482.

IV.

NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING CERTIORARI

The petition and brief do not disclose that petitioners have been denied any rights, that "special and important reasons" exist for granting *certiorari*, nor that the court below "decided a federal question of substance, not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 38 (5).

The absence of necessary grounds granting *certiorari* is apparent when the questions involved are considered. Respondent brought the action to cancel a lease of a radio station and assignment of license to operate it because of fraud in procuring the license and assignment. (R. 10). The court below canceled the lease, but not the assignment, and ordered the station restored to its owner (R. 744). The petitioners filed motions for rehearing, which claimed the court below did not have jurisdiction of any part of the subject of the action and that exclusive jurisdiction was vested in the Commission (R. 769, 778). This was the first time such a claim had ever been made. The motion for rehearing was denied (R. 794), and in a supplemental opinion the court below stated that the court had jurisdiction of all the questions involved, except the Commission had jurisdiction of the transfer of the license, and that such jurisdiction had never been questioned (R. 794, 797).

It is apparent from the foregoing statement of material facts that petitioners will not be deprived of any right to which they are entitled under the Communications Act.

Their only right, if any, under that act is to have the Commission decide whether the station license should be transferred back to the owner, and that right is specifically recognized and preserved by the court below.

Nor are any "special or important reasons" for granting *certiorari* disclosed. Only the petitioners are adversely affected by the decision, and no question of public interest is involved. Petitioners, after having assented to the jurisdiction of the court below and taking their chances of success, should not be entitled to secure further consideration of the case by now claiming the court did not have jurisdiction of any part of the subject matter. The following statement from *Mays* v. *Fritton*, 87 U. S. 414, shows the lack of merit in petitioners' claim:

> "It is not competent to a party to assent to a proceeding in the court below, taking his chances of success and, upon failure, come here and object that the court below had no authority to take the proceeding."

The decision does not establish any new principals or destroy any old ones. It does not decide a federal question of substance. It clearly recognizes the power conferred on the Commission by the Communications Act back to the owner. This court has always construed the Communications Act to confer on the Commission power to determine whether a transfer of a station license is in the public interest. It has never construed the Communications Act to confer on the Commission power to determine whether a license of a station should be canceled because of fraud in its procurement. No reasonable basis for such a construction exists. The question of fraud practiced on the owner of this station in procuring the lease is purely a matter of local law. It is clear that none of

to determine whether the license should be transferred

the reasons mentioned in the statute or rules justify the granting of *certiorari*.

V.

THE PETITION AND BRIEF OF PETITIONERS DO NOT DISCLOSE ADEQUATE REASONS FOR GRANTING CERTIORARI

We believe we have shown under the previous headings that *certiorari* should be denied. We will now comment under appropriate subheadings on the sufficiency of the grounds asserted in the petition and brief of petitioners.

Petitioners' Statement of "Questions Presented" is Inaccurate

Petitioners (Pp. 3-4) describe five questions presented. On page 5 hereof we have restated those questions for the sake of accuracy.

In question No. 1 petitioners mention the court "passing on the reasonableness or validity of transfers of radio broadcasting stations." We do not believe any such question is here involved. The court below did determine that the transfer of the station was invalid because the lease was procured by fraud, but no question as to the "reasonableness" of the transfer was ever considered.

In question No. 2 petitioners mention "jurisdiction over a suit to set aside, modify or review an assignment of a radio station license and a lease of the station facilities." This action did not involve a modification or review of the assignment of the license and lease. The action was to set aside the lease and assignment of the license because of fraud.

In question No. 3 petitioners mention the judgment of the court below as "annulling in legal effect the orders of the Commission of December 15, 1942, and January 12, 1943." This is not an accurate statement, for the Commission, in the first order, merely gave its consent to an assignment of the license (Ex. 32, R. 661, 662), and in the second refused to extend the time for transferring the license (Ex. 34, R. 663, 664).

In question No. 5 petitioners ask whether the decision below is contrary to the decisions of this court "by attributing valuable property interests to a radio station license in violation of the" Communications Act. No such question exists, for the supplemental opinion of the court below does *not* attribute any property interest in the license.

Petitioners Have Not Shown Any Reason or Basis For Respondent to Intervene in Proceedings Before the Commission

Petitioners (P. 8) mention the joint application filed by the lessor and lessee requesting the Commission to extend the time for tranferring the station and license until final adjudication of this action. Petitioners then state that respondent failed to take any steps to intervene in the proceedings before the Commission, and later (Pp. 32-3) says respondent's remedy was to intervene. No sound reason is suggeseted why the respondent should intervene. This action was then pending involving the validity of the lease and there was no reason for respondent to attempt to present the validity of the lease to the Commission. It had no jurisdiction of such an action. That was a question of local law which was properly within the

jurisdiction of the court below to determine and was then so recognized by the petitioners. It is significant the petitioners did not then suggest that the Commission should determine the validity of the lease, but asked that the Commission extend the time for the transfer of the station and license until the issues had been decided in this action (Ex. 33, R. 665, 667-669). When the Commission refused to extend the time the petitioners did not appeal therefrom.

Petitioners' Claim That Federal Question Was Properly Raised is Not Supported by Record

The statement by petitioners (P. 19), that the federal questions were raised and preserved by the motion and answer in the trial court is not accurate. The motion referred to is shown by reference to the record to be the motion to strike parts of the petition later mentioned by petitioners (P. 21). The motion and order overruling it were not part of the record in the court below, as petitioners' request to include it after the decision in respondent's favor (R. 785) was denied (R. 791). Furthermore, the motion does not question the jurisdiction of the court to determine whether the lease should be canceled because of fraud, but only asserts the transfer of the license was a matter exclusively within the jurisdiction of the Commission, which has always been the position of all parties (R. 785). The answer filed by those same petitioners did not question the jurisdiction of the court in any respect (R. 31). Furthermore, both the lessor and lessee requested the Commission to extend the time for transferring the station and license "until final adjudication" of this action (Ex. 33, R. 667-669, 665).

The jurisdiction of the court to determine whether the station lease should be canceled because of fraud in procuring it was never questioned in any way until the motion for rehearing filed after the decision of the court below. Previous reference to jurisdiction involved only the claim that the Commission had exclusive jurisdiction of the transfer of the license, and this was never questioned by respondent.

Petitioners' Claim That the Public Interest was Involved is Not Supported by the Record

Petitioners (P. 28) assert that the issues decided by the court below were ones affecting the public and thus came within the provisions of the Communications Act. The court below decided that the lease of the station was procured by fraud, and therefore ordered it canceled. Such a decision would not in any way affect the public interest, for as that term is used in the Communications Act it refers to the listening public. Whether the station was operated by the lessor or the lessee would not make any difference to the listening public, for the management remained the same.

There is nothing in the record to support petitioners' statement (P. 29) that the Commission "had a paramount concern, from the standpoint of the public interest, in the very financial and managerial arrangements found inadequate by the Nebraska Supreme Court solely from the standpoint of supposed private rights." The only concern of the Commission was whether the station would be operated properly. It was undisputed that the operation of the station had been very satisfactory prior to the lease, and the application specifically stated that "peti-

tioner Gillin will continue to be general manager of WOW and no changes in staff are contemplated" (Ex. 29, R. 376, 397, 375). The financial statement submitted with the application apparently satisfied the Commission that the lessee had sufficient capital to properly operate and maintain the station. It appearing to the Commission that the lessee had competent management and adequate capital to operate and maintain the station, it gave its consent to the assignment of the license.

The court below did not find inadequate "those financial and managerial arrangements." The finding that the transfer of the station under the lease should be canceled because of fraud, did not relate to the operation of the station by the lessee. *Heitmeyer* v. *FCC*, 95 Fed. 2nd 91, cited by petitioners (P. 30) does not support petitioners' claim that the Commission had jurisdiction over all questions relating to the station, including the cancellation of the lease. The court there recognizes that the interest of the Commission is in the continuance of a properly operated station. No such question has ever been involved in the present case.

The Communications Act did not place on the Commission any duty to determine whether lessor was receiving adequate consideration for the lease, and there is nothing in the record to show that the Commission ever considered that question. The effort of petitioners to extend the jurisdiction of the Commission to a determination of the adequacy of the consideration to be paid by the lessee is manifestly unsound. The fact that the lessor might receive an inadequate rental could not in any way affect the proper operation of the station.

Petitioners' Claim That Commission Has Primary Jurisdiction of All Questions Relating to Radio Cannot be Sustained

Petitioners (P. 31), assert that the primary jurisdiction doctrine applies to the Commission. If we assume that it does, it did not affect its jurisdiction in this case. The cases cited by petitioner show that administrative agencies such as the Interstate Commerce Commission have primary jurisdiction only of matters committed to them by statute. The matters thus committed to them are ordinarily problems of administration, such as regulation of rates and operations. Not one of the cases cited hold that any such agency has exclusive jurisdiction over *every* question relating to the properties with which it is concerned. Such construction of the applicable statutes would be unreasonable. For example, what justification would there be for holding that the courts in Nebraska would not have jurisdiction of an action to cancel a lease of a railroad depot in Omaha, alleged to have been procured by fraud, because the Interstate Commerce Commission had exclusive jurisdiction of the regulation of the operation of railroads.

Marony v. *Applegate*, 266 App. Div. 412, 42 N. Y. S. (2d) 768, cited by petitioners (P. 32) is not in point because the statute under which the Interstate Commerce Commission functions specifically directs it "to prescribe a just division of joint rates among carriers," and so the court held a suit could not be maintained for unfair division of rates until the Commission had first determined what division would be fair. In the present case no provision of the Communications Act directs the Commis-

sion to determine whether a lease rental of a station is adequate or whether the lease has been fraudulently procured.

Likewise, in the other cases cited by petitioners under that heading, the agency was held to have primary jurisdiction, because the issue involved was one specifically delegated to it by the statute.

Furthermore, the doctrine does not hold that the administrative agency has *exclusive* jurisdiction, but only *primary* jurisdiction. In *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422, cited by petitioners (Pp. 21, 31), it was held that the lower court had jurisdiction of an action to recover additional compensation for use of cars, but that the Interstate Commerce Commission should be first permitted to determine as an "administrative problem" the reasonableness of practices with reference to the amount allowable for use of cars. It is obvious that a question of a railway charge is one over which the Interstate Commerce Commission has jurisdiction, as the court found, it was an administrative problem.

Even if the primary jurisdiction doctrine is applied it should not affect the decision of the court below, because no claim was ever made that the Commission had primary jurisdiction until after the decision by the highest court in Nebraska. The failure of the petitioners to have made a timely claim that the Commission had primary jurisdiction would seem to constitute a waiver of any such claim.

Petitioners' Claim That Commission Has Exclusive Jurisdiction Cannot be Sustained

Petitioner (P. 34) asserts that the court below erroneously concluded that "the fact that the property involved was used in a licensed business was an incident to the suit only." We believe the court's statement is fully supported by the record and the decisions of this court. Certainly, the cancellation of the *lease* of the station was the primary purpose of the action, and the cancellation of the transfer of the *license* was merely an incident. When the lessor and other petitioners alleged in their answer that the Commission had jurisdiction of the transfer of the license only (R. 21), respondent admitted that allegation in his reply (R. 36). This, in effect, took that issue out of the case, and the court proceeded to determine the other issues. There is no more basis for claiming that the Commission has jurisdiction of any action relating to the station simply because it has issued a license for the operation of the station that there is to claim that a state administrative body which issues licenses for the use of automobiles has exclusive jurisdiction of every action in any way relating to an automobile.

A situation somewhat analogous to the present case has arisen in connection with litigation involving patents and trademarks. It has been uniformly held that even though such litigation may involve the ownership of patents granted by the Federal government, yet state courts have a right to decide controversies with reference thereto. In *Pratt* v. *Paris Co.*, 168 U. S. 255, 259, the court held that evidence of the invalidity of a patent and its infringement of a prior patent would not oust the jurisdiction of a state court in an ordinary action of *assumpsit*, the ques-

tion of the invalidity of the patent being incidental to a defense of the lack of consideration and of a rescission of the contract.' The court further held that the power of state courts to determine questions arising under the patent laws is not precluded by the federal statute excluding them from jurisdiction of cases arising under those laws. On this subject the court said:

> "the state court had jurisdiction both of the parties and the subject-matter, as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of the defenses, the defendant claimed the invalidity of a certain patent."

See *Becher* v. *Contoure Laboratories*, 279 U. S. 388, for a similar holding. Likewise, in the present case the state court's jurisdiction over the question of the validity of the lease of the station could not be "ousted" because the license to operate it was under the control of the Commission.

Petitioners (P. 37) cite *Venner* v. *Michigan Central R. R. Co.*, 271 U. S. 127, to support their claim that the court below did not have authority to vacate an order of the Commission. The Commission did not order the transfer of the license, but merely consented to such transfer (Ex. 32, R. 661, 662). The foregoing case is distinguishable from the present case in many respects. In that case the court found "that the suit was essentially one to annul or set aside an order of the Interstate Commerce Commission" authorizing and approving the issuance of bonds in payment for equipment. The statute gave the Commission exclusive jurisdiction of questions involving the issuance of bonds. In the present case there was no order to vacate and the Commission never authorized or ap-

proved the leasing of the station. Its consent to the transfer of the license was only an incidental matter, and the Communications Act gives the Commission no jurisdiction to determine the validity of the station lease, which was the main issue in the present case.

No cases have been cited by petitioner where the Commission has been held to have jurisdiction over the transfer of a license unless it was claimed the proposed transfer would be detrimental to the interest of the public either because the assignee was not properly qualified to operate the station or the territory was already adequately served by other stations. Nor have any cases been cited holding that the Communications Act vests in the Commission exclusive jurisdiction of *all* questions relating to radio broadcasting stations and equipment, and we do not believe any can be found, for such a construction of the Act is unjustified.

The Commission itself has recognized that it does not have jurisdiction of all questions relating to stations and their equipment. In the Matter of Buffalo Broadcasting Corp. (WKBW), 9 F. C. C. 31, 32, a petition to intervene was filed by a mortgagee of a station's equipment to oppose the granting of a construction permit to move the station without provision for giving petitioner security on the proposed new equipment at the new site. The petition was dismissed because "the enforcement of the * * * contract between petitioner and" the station "with respect to security required thereunder * * * *is a matter over which the Commission has no jurisdiction.*" The petition was "dismissed without prejudice to any contract or property right of petitioner or *its right to proceed before other tribunals.*" (Italics supplied).

Thus, the Commission itself has rightly recognized that if does not have exclusive jurisdiction of all matters relating to stations.

Petitioners' Claim That Non-Federal Grounds Do Not Exist is Contrary to the Record

Petitioners' statement (P. 38) that the court decided all non-federal grounds in their favor is contrary to the record. The court below found that the lease was procured by fraud because it was made by the officers of lessor in violation of their fiduciary duties as such officers (R. 759, 760); and because the rental to be paid thereunder was so grossly inadequate as to establish fraud (R. 751, 760). Both of those are non-federal grounds.

Petitioners' statement (P. 38) that "the decision below was plainly based on financial and managerial aspects of the station lease, an assignment of license within the primary jurisdiction of the Federal Communications Commission and upon which the Commission acted" is likewise contrary to the record. The court below based its decision on the fraudulent character of the lease, while the Commission apparently based its consent to the assignment of the license on the showing that the lessee was competent to continue the proper operation of the station (Ex. 29, R. 376, 397, 375). The jurisdiction of the court below related to the validity of the transfer of the station. The jurisdiction of the Commission related to the proper operation of the station after the transfer. The court below clearly recognized the two jurisdictions and based its decision on the non-federal ground.

Petitioners' Claim That the Commission Has Jurisdiction of Proceedings to Cancel a License Has No Application to the Present Case

Petitioners (P. 39) state that "even in cases of actual fraud" the Commission "must decide whether license cancellation is in the public interest," and a proceeding before the Commission involving cancellation of a license is cited. Neither the statement nor the case are applicable, because the *cancellation* of a license is not involved in the present case. The proceedings cited is In the Matter of the Revocation of License of the Panama City Broadcasting Co. (WDLP), 9 F. C. C. 208, where the Commission refused to *revoke* a license to operate a station which was fraudulently procured from the Commission. The proceeding is clearly distinguishable from the present action because (1) It involved *cancellation* rather than *transfer* of a license; (2) A fraud was committed on the Commission in securing the license, and Section 312 (a) provides for revocation of a license by the Commission "for false statements either in the application or in * * * (other) statements of fact" required by the Commission; (3) the license was for the only station in the community and the Commission found that if it revoked the license the community would be deprived of radio facilities; thus the public interest would be best served by the continued operation of the station.

Petitioners' Claim That Court Attributed Property Interest in Station License is Contrary to the Record

Petitioners' statement (P. 40) that the decision attributes valuable property interests to the station license is directly contrary to the record. The supplemental opinion states:

"Such a license is a permissive grant of a privilege and creates no vested property rights in the licensee." (R. 797). Petitioners state (P. 40): "It is difficult to understand a finding of gross inadequacy in an annual rental of $74,000 a year for physical properties originally costing $175,000." The station earned $287,437.74 net profit in 1942 (R. 751), and the rental, which is about one-fourth of that amount, is obviously grossly inadequate. While the station originally cost $175,000, it is undisputed that improvements and new equipment were constantly added, so that its present value is undoubtedly much greater than $175,000. In any event the court will accept the finding of fact by the court below that the rental was grossly inadequate and that the license "creates no vested property right in the licensee."

Petitioners' Claim That the Case is of Vital Public Importance is Not Supported by the Record

Petitioners state (P. 41) that the public is faced with a dilemma because under the decision of the court below the station is to be returned to the lessor but the lessee retains the license. That is hardly a fair reflection of the situation. The judgment orders "That generally everything be done to restore the parties to their original position prior to the entering into of the lease," (745), which would include an application to the Commission for consent to transfer the license to the lessor. It would seem reasonable to assume that the Commission would give its consent. The lessor's successful operation of the station for nearly 20 years assures its ability to continue that operation.

It cannot be assumed that the Commission would refuse its consent to the transfer of the license to the lessor,

for that might deprive the listening public of the broadcasting service of the station, and also would be condoning the fraud which wrongly deprived the lessor of the station. If the lessor desires to then lease the station for an adequate rental or sell it, no doubt the Commission would consent to a transfer of the license to a properly qualified lessee or purchaser, so that the public will continue to receive the broadcasts from this station.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition sets forth no substantial ground for the granting of *certiorari*, and that the petition should be denied.

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